No. 85-298

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,
Petitioner,

vs.

ANDREW K. BURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

May Colorado's long-arm statute, C.R.S. § 13-1-124, be applied, consistent with the Fourteenth Amendment to the United States Constitution, to confer *in personam* jurisdiction over a Nebraska resident whose sole contact with the forum state was to respond to a private, unsolicited inquiry about the performance of a former student in a Nebraska orthopedic residency program in light of the petitioner's duty to respond to such inquiries wherever any of his ex-students may choose to reside and seek academic references?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
A. Facts Giving Rise to this Controversy	4
B. The District Court's Ruling	5
C. Proceedings in the Court of Appeals	6
SUMMARY OF ARGUMENT	8
ARGUMENT: IMPOSITION OF *IN PERSONAM* JURISDICTION UNDER THE FACTS PRESENTED VIOLATES PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT	10
I. THE CONSTITUTIONAL STANDARD	10
II. DISCHARGE OF AN ADMITTED DUTY TO RESPOND TO AN UNSOLICITED INQUIRY INITIATED BY THE PLAINTIFF IN ANOTHER STATE CANNOT CONSTITUTE A JUDICIALLY COGNIZABLE CONTACT WITH THE FORUM	16
A. The Essential Constitutional Ingredient of Purposeful Availment By The Defendant of the Benefits and Protections of the Laws of the Forum is Absent Here	16

TABLE OF CONTENTS—Continued

Page

B. The Contact in Question Resulted Solely From the Unilateral Act of the Plaintiff In Choosing to Apply for Hospital Privileges in Colorado 22

III. CONTRARY TO THE TENTH CIRCUIT'S IMPLICIT HOLDING, MERE EFFECT IN THE FORUM IS NOT *IPSO FACTO* SUFFICIENT TO IMPOSE PERSONAL JURISDICTION 27

IV. EVEN IF THE ISSUANCE OF THE LETTER COULD BE SAID TO CONSTITUTE A CONSTITUTIONALLY SUFFICIENT MINIMUM CONTACT, THE FORUM'S PARAMOUNT INTEREST IN MAINTAINING THE QUALITY OF HEALTH CARE WEIGHS AGAINST FINDING COLORADO A FAIR FORUM 31

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Pages

Associated Inns & Rest. Co. v. Development Associates, 516 F.Supp. 1023 (D. Colo. 1981) 26, 29

Ballard v. Fred E. Rawlins, M.D., Inc., 101 Ill. App. 3d 601, 428 N.E.2d 532, 25 A.L.R.4th 699 (1981) 25

Beth Israel Hosp. v. District Court, 683 P.2d 343 (Colo. 1984) 36

Burger King Corp. v. Rudzewicz, 471 U.S. —, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) 13, 14, 15, 17, 18, 21, 24, 32

Burt v. Board of Regents of the University of Nebraska, 757 F.2d 242 (10th Cir. 1985) (*"Opinion below"*) ..... *passim*

Burt v. Board of Regents of the University of Nebraska, No. 81-JM-1850, Slip op. (D. Colo. October 1, 1982) 5, 6, 11, 22

C.F.H. Enterprises, Inc. v. Heatcool, 538 F.Supp. 774 (D.Colo. 1982) 29

Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) 6, 7, 9, 17, 22, 23, 27, 28, 29, 30, 31

Cook v. G.D. Searle & Co. Inc., 475 F.Supp. 1166 (S.D. Ia. 1979) 37

Findlay v. Dethuit, 86 A.D.2d 789, 446 N.Y.S. 2d 951 (1982) 26

Fleet Leasing, Inc. v. District Court, 649 P.2d 1074 (Colo. 1982) 12, 29

Franco v. District Court, 641 P.2d 922 (Colo. 1982) 35

Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972) 29

Hanson v. Denckla, 357 U.S. 235 (1958) 13, 17, 24

TABLE OF AUTHORITIES—Continued

Pages

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) 12

Howard v. United States, 126 F.2d 667 (10th Cir.), *cert. denied*, 316 U.S. 699 (1942) 11

Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694 (1982) 13

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 8, 10, 12, 13, 14, 17, 27, 28, 30, 31, 32

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) 6, 9, 32, 33

Kulko v. California Superior Court, 436 U.S. 84 (1978) 10, 15, 17, 19, 20, 24, 29

Le Manufacture Francaise v. District Court, 620 P.2d 1040 (Colo. 1980) 11

McBreen v. Beech Aircraft Corp., 543 F.2d 26 (7th Cir. 1976) 26

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 12, 37

Marquest Medical Products, Inc. v. EMDE Corp., 496 F.Supp. 1242 (D. Colo. 1980) 11

Paul v. Davis, 424 U.S. 693 (1976) 20

Pemberton v. Sperandio, 439 U.S. 812 (1978) (Mem.) 10, 19

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) 12, 33

Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1878) 13

Posey v. District Court, 196 Colo. 396, 586 P.2d 36 (1978) 35

TABLE OF AUTHORITIES—Continued

Pages

Premier Corp. v. Newsom, 620 F.2d 219 (10th Cir. 1980) 25

Quarles v. Fuqua Industries, Inc., 504 F.2d 1358 (10th Cir. 1974) 22

Rush v. Savchuk, 444 U.S. 320 (1980) 24

Scheuer v. District Court, 684 P.2d 249 (Colo. 1984) 11

Shaffer v. Heitner, 433 U.S. 186 (1977) 13, 14, 17, 33

Sibley v. Superior Court, 16 Cal.3d 442, 128 Cal. Rptr. 34, 546 P.2d 322, *cert. denied*, 429 U.S. 826 (1976) 28

Sperandio v. Clymer, 568 S.W.2d 935 (Mo. 1978) (*"Sperandio I"*) 10, 18, 19

Sperandio v. Clymer, 581 S.W.2d 377 (Mo. 1979) (*"Sperandio II"*) 10, 18, 19, 20

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 6, 12, 13, 14, 15, 18, 21, 23, 24, 27, 29

Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972) 26

STATUTES

C.R.S. §§ 12-36-101, *et seq.* (1985 repl. vol.) 34

C.R.S. § 12-43.5-101 (1985 repl. vol.) 16, 34

C.R.S. § 13-1-124 (1973 & Cum. Supp. 1985) 2, 10

C.R.S. §§ 25-3-110, *et seq.* (1982 repl. vol. & Cum. Supp. 1985) 34

MISCELLANEOUS

Fed. R. Civ. P. 4(f) 11

2 J. Moore, *Moore's Federal Practice* ¶ 4.41-1[3] (2d ed. 1985) 22

Restatement (Second) of Conflict of Laws § 37 (1971) 20, 27, 28, 29

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BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 757 F.2d 242 and are reprinted beginning at page 105 of the Joint Appendix ("J.A."). The Memorandum Opinion and Order of the District Court for the District of Colorado, which is not reported, is reproduced at J.A. 101-04.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 20, 1985. A timely petition for rehearing *en banc* was denied on June 17, 1985 (J.A. 117). The petition for a writ of certiorari was filed on August 22, 1985 and granted on December 2, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATUTORY PROVISION INVOLVED

C.R.S. § 13-1-124 (1973 & Cum. Supp. 1985):

> *Jurisdiction of Courts.* (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the State of Colorado, either in person or by an agent, submits such person, and, if a natural person his personal representative to the juris-

diction of the courts of this state concerning any cause of action arising from:

(a) The transaction of any business within the state;

(b) The commission of a tortious act within the state;

(c) The ownership, use, or possession of any real property situated in this state;

(d) Contracting to ensure any person, property, or risk residing or located within this state at the time of contracting; or

(e) The maintenance of a matrimonial domicile within this state with respect to all issues relating to obligations for support to children and spouse in any action for dissolution of marriage, legal separation, declaration of invalidity of marriage, or support of children if one of the parties of the marriage continues without interruption to be domiciled within the state.

———o———

STATEMENT OF THE CASE

This case presents issues involving "specific" *in personam* jurisdiction in the single-act context. The instrumentality which allegedly caused an "effect" within Colorado is a private letter which Dr. Connolly, the petitioner, had a duty to write in response to an unsolicited inquiry concerning the credentials and qualifications of the respondent, Dr. Burt, an ex-student of Dr. Connolly. The inquiry was initiated in Colorado due to Dr. Burt's decision to move there and apply for hospital privileges. The inquiry promised that the response would be held in confidence.

A. Facts Giving Rise to This Controversy.

The respondent, Andrew K. Burt (plaintiff below), a medical doctor, completed a residency in orthopedic surgery at the University of Nebraska Medical School in Omaha, Nebraska in 1977. Several years later, after residing in California, he moved to the State of Colorado with the idea of establishing a practice in orthopedic surgery in a resort-town of Vail. When Dr. Burt applied for staff privileges in orthopedic surgery at Vail Valley Community Hospital through Presbyterian Denver Hospital, an official of the hospital inquired of petitioner John F. Connolly, Chairman of the Department of Orthopedic Surgery and Rehabilitation at the University of Nebraska Medical School, as follows:

> Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgement, personal habits, morals, ethics, etc.
>
> Your answer will be confidential.

J.A. 36.

Dr. Connolly responded to the inquiry as follows:

> In reply to your inquiry about Dr. Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

J.A. 37.

Contending that he was denied staff privileges as a result of Dr. Connolly's letter, Dr. Burt brought suit in the United States District Court for the District of Colorado against the Board of Regents of the University of Nebraska and Dr. Connolly on claims of defamation, breach of contract, interference with prospective advantage, and outrageous conduct. Complaint, J.A. 4-9. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. *Id.* Later, Dr. Burt amended his Complaint to add a claim under 42 U.S.C. § 1983 and invoking federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. Amended Complaint, J.A. 64-67. Dr. Connolly was served with process in Nebraska. Service was had on the Board of Regents by service on its agent also in Nebraska.

The Board of Regents and Dr. Connolly moved to quash summonses and dismiss the Complaint on alternative grounds of lack of *in personam* jurisdiction, Eleventh Amendment immunity, and failure to state a claim upon which relief could be granted. Motion, J.A. 10-14. Dr. Connolly's unchallenged affidavit (J.A. 34-36) establishes that he has no contact with the state of Colorado other than the mailing of the above-quoted letter to Presbyterian Denver Hospital in Denver, Colorado (which oversees Vail Valley Community Hospital) on October 21, 1980. *See also* Memorandum Opinion and Order, J.A. 101. Dr. Connolly was, and remains, a Nebraska resident. He owns no property within the state of Colorado and has transacted no business within the state of Colorado. Connolly Affidavit, J.A. 34-36.

B. The District Court's Ruling

In its Memorandum Opinion and Order (J.A. 101-04) entered on October 1, 1982, the District Court dismissed

the Complaint against the Board of Regents on Eleventh Amendment grounds, and no appeal was taken from that ruling.

The District Court dismissed the Complaint against Dr. Connolly for lack of *in personam* jurisdiction, concluding that although the conduct in question was technically within the reach of the tortious act provision of Colorado's long-arm statute, minimum contacts required for the exercise of ***in personam*** jurisdiction were absent here. Addressing the foreseeability of being haled into a foreign forum under *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the District Court said:

> I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

J.A. 103-04.

C. Proceedings in the Court of Appeals

Dr. Burt appealed the dismissal of his claims against Dr. Connolly to the United States Court of Appeals for the Tenth Circuit. While the appeal was pending, this Court rendered decisions in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) and *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984).

In a split decision (J.A. 105-116), the Court of Appeals, finding *Keeton* and *Calder* controlling, reversed the District Court's dismissal of the Complaint. Writing for the majority, Judge Seymour said:

> Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim.

Burt v. Board of Regents of the University of Nebraska, 757 F.2d 242, 245 (10th Cir. 1985) (hereinafter "*Opinion below*"); J.A. 110-11.

Judge Seth dissented, taking issue with the majority's mechanical application of an "effects" test in defamation cases, pointing out that the Court in *Calder* relied on multiple "elements" in finding minimum contacts, only half of which are present in this case. *Id.*, 757 F.2d at 245; J.A. 111 (Seth, J. dissenting). Focusing on the fact that the unilateral activity of Dr. Burt created the only contact with the state of Colorado in this case, Judge Seth stated:

> The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado.

Id., 757 F.2d at 246; J.A. 113 (Seth, J. dissenting) (citation omitted).

Finally, Judge Seth called into question the majority's presumption of the truthfulness of allegations in Dr. Burt's Complaint in deciding a challenge to personal jurisdiction. *Id.*, 757 F.2d at 247; J.A. 115-16 (Seth, J., dissenting). Judge Seth's dissent pointed out that the trial judge's evaluation and finding of jurisdictional facts should not have been set aside by the Court of Appeals without a finding that the trial court's decision was clearly erroneous. *Id.*

SUMMARY OF ARGUMENT

As a constitutional prerequisite to a federal district court's imposition of jurisdiction over a non-resident by application of a state's long-arm statute, it is essential that the defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).

The constitutional test enunciated by *International Shoe* involves a two-step analysis. First, the defendant must have a constitutionally cognizable contact with the forum (*i.e.,* did he purposely avail himself of the right and privilege of conducting activities in the forum state?). If the answer to this question is "no," the inquiry must end because jurisdiction may not be constitutionally imposed.

Second, if a constitutionally cognizable tie exists between the defendant and the forum, the Court then must determine whether imposition of jurisdiction in the particular circumstances presented will offend traditional notions of fair play and substantial justice. Resolution of the second tier of analysis involves the balancing of various factors, and if resolved in the negative, the Fourteenth Amendment will not permit imposition of jurisdiction.

Petitioner submits that both levels of inquiry in this case must be resolved in the negative, and therefore, the Tenth Circuit Court of Appeals decision must be reversed.

The discharge of an admitted duty through the medium of a private letter response to an unsolicited inquiry generated in a foreign state about an ex-student cannot

constitute a constitutionally cognizable contact with that forum because: (1) Dr. Connolly did not purposely avail himself of any right or privilege of the forum since his response, compelled by a duty, was not truly volitional or intentional, nor did it entail any personal or economic gain; (2) the contact with Colorado in this case emanated solely from the unilateral activity of Dr. Burt in choosing to locate and apply for hospital privileges there; and (3) Dr. Connolly had no reasonable expectatior of being haled into a Colorado tribunal as a result of responding to an unsolicited inquiry when that response was promised to be held in confidence, where he had no other contacts whatsoever with the State of Colorado, and where his response was but one consideration in the calculus of determining Dr. Burt's application for hospital privileges. There being no judicially cognizable tie between petitioner and the State of Colorado, this Court may and should end its inquiry there and reverse the Court of Appeals decision.

Even if it can be said that there was a constitutionally cognizable contact between petitioner and the State of Colorado in this case, imposition of jurisdiction under the particular circumstances presented would offend traditional notions of fair play and substantial justice because: (1) a mere effect in the forum will not sustain jurisdiction if other factors render exercise of jurisdiction unfair or unreasonable; and (2) exercise of jurisdiction here would be unreasonable because the interest of Colorado in redressing alleged wrongs occurring within its boundaries is substantially outweighed by that state's interest in insuring the quality of medical care available within the state.

The Tenth Circuit misread and misapplied *Keeton* and *Calder* in imposing jurisdiction here by ignoring their

dramatic factual and legal dissimilarities from the instant case and in totally failing to address *International Shoe's* required second level of analysis. Concluding that cases involving defamation claims arising from the instrumentality of nationally circulated commercial publications dictate imposition of jurisdiction here simply misses the constitutional boat.

A case previously considered by this Court is most factually similar to and, petitioner submits, dispositive of the instant matter. *See, Pemberton v. Sperandio,* 439 U.S. 812 (1978) (Mem.), in which this Court vacated *State ex rel. Sperandio v. Clymer,* 568 S.W.2d 935 (Mo. 1978) (*"Sperandio I"*) (which found jurisdiction over a non-resident based upon his mailing of a letter into the State of Missouri allegedly causing an effect there) and remanded for reconsideration in light of *Kulko v. California Superior Court,* 436 U.S. 84 (1978).

Upon remand, the Missouri Supreme Court in *State ex rel. Sperandio v. Clymer,* 581 S.W.2d 377 (Mo. 1979) (*"Sperandio II"*), reversed its earlier decision and concluded that a physician's response to an unsolicited letter seeking his opinion on a case could not constitutionally support imposition of jurisdiction upon him despite an alleged "effect" within the State of Missouri.

ARGUMENT: IMPOSITION OF IN PERSONAM JURISDICTION UNDER THE FACTS PRESENTED VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

I. THE CONSTITUTIONAL STANDARD

Colorado's long-arm statute, C.R.S. § 13-1-124 (1973 & Cum. Supp. 1985), in pertinent part, extends the juris-

diction of courts in Colorado (including, for purposes of this case, the Federal District Court sitting within the state[1]) to non-residents of Colorado for all causes of action arising from: "(b) the commission of a tortious act within this state."

Colorado courts have uniformly interpreted the State's long-arm statute to extend the personal jurisdiction of Colorado's courts to the maximum limits permissible under the United States and Colorado constitutions. *E.g., Scheuer v. District Court*, 684 P.2d 249, 250 (Colo. 1984). Conversely, the Colorado "legislature did not intend that the long-arm statute be construed to permit jurisdiction to be asserted when to do so would violate due process of law." *Le Manufacture Francaise v. District Court*, 620 P.2d 1040, 1044 (Colo. 1980).

It is alleged in this case that a letter written by Dr. Connolly in Nebraska has caused injury in Colorado, thus satisfying the "tortious act" provision to invoke long-arm jurisdiction as a threshold matter. *Burt v. Board of Regents of the University of Nebraska*, No. 81-JM-1850, Slip Op. at 3 (D. Colo. October 1, 1982), J.A. 103.

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[1] For purposes of *in personam* jurisdiction for claims based on state law, the law of the state in which the federal court sits controls, subject to due process guarantees of the United States Constitution. *E.g., Marquest Medical Products, Inc. v. EMDE Corp.*, 496 F. Supp. 1242 (D. Colo. 1980). With respect to the respondent's claim based on 42 U.S.C. § 1983, Fed. R. Civ. P. 4(f) provides that service of process may be made within the territorial limits of the state in which the federal court sits unless a specific statute or rule authorizes service beyond the state's boundaries. *See Howard v. United States*, 126 F.2d 667 (10th Cir.), *cert. denied*, 316 U.S. 699 (1942). No statute providing for nationwide service of process is applicable to respondent's federal law claim.

Dr. Burt does not contend that Dr. Connolly has conducted regular and systematic activities within the State of Colorado. Rather, Dr. Burt seeks to exercise "specific jurisdiction" over Dr. Connolly in a suit allegedly arising out of Dr. Connolly's specific contacts within Colorado. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, 411 n.8 (1984); *compare Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) ("general" jurisdiction based on regular and systematic activities) *with McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) ("specific" jurisdiction in cause of action arising from specific activities).

The critical inquiry is whether the exercise of *in personam* jurisdiction on the basis of the letter written by Dr. Connolly comports with due process of law. *Fleet Leasing Co. v. District Court*, 649 P.2d at 1074 (Colo. 1982). The mere fact of harm in Colorado arising from extra-forum conduct will not automatically justify exercise of jurisdiction. If other factors render jurisdiction unfair under the circumstances, it may not be imposed. *Id.* at 1078.

The modern due process standards governing the assertion of extra-territorial *in personam* jurisdiction over a non-resident defendant are set forth in *International Shoe Co., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and other cases. The well known standard is that defendants must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). While the standard set forth in *International Shoe* represents a relaxation of the doctrine of

strict territoriality of *Pennoyer v. Neff*, 95 U.S. (5 Otto.) 714 (1878):

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Hanson v. Denkla, 357 U.S. 235, 251 (1958).

The standard for deciding questions of *in personam* jurisdiction set forth in *International Shoe* applies equally to individuals and corporations alike. *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977), *quoting International Shoe*, 326 U.S. at 319. Likewise, the minimum contacts analysis now applies to all actions affecting the interests of nonresident defendants whether those actions be *in personam* or *in rem*. *Shaffer v. Heitner*, 433 U.S. at 206.

The minimum contacts standard protects individual liberty interests preserved by the due process clause. *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 & n.10 (1982). It also ensures that the states do not reach out beyond the limits imposed on them by principles of federalism. *World-Wide Volkswagen*, 444 U.S. at 292.

The *International Shoe* standard was recently explicated by this Court in *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). To determine whether the exercise of *in personam* jurisdiction comports with due process, courts must apply a two-step analysis.

First, it must be established that the defendant "purposefully established 'minimum contacts' in the forum

state." *Id.*, 85 L.Ed.2d at 542, citing *International Shoe*, 326 U.S. at 316. If it is found that the defendant has not established minimum contacts with the forum state, i.e. "purposefully availed" himself of conducting activities in the state "in a way that would justify bringing [him] before a [forum state] tribunal," *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977), by voluntarily creating a "substantial connection" with it, *see Burger King*, 85 L.Ed.2d at 540-43, the inquiry ends there. *Id.*, 85 L.Ed.2d at 543.

Second, when "it has been decided that the defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.*, 85 L.Ed.2d at 543, citing *International Shoe*, 326 U.S. at 320. Thus, in the second tier of due process analysis, it is appropriate for courts to weigh other factors such as the burden on the defendant to defend suits in distant forums, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining redress, the shared interest of the several states in furthering fundamental social policies, and others. *Id.*, citing *World-Wide Volkswagen*, 444 U.S. at 292.

With respect to the first level of due process analysis, foreseeability of causing injury within the forum state is not a "'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 85 L.Ed.2d at 542; *World-Wide Volkswagen*, 444 U.S. at 295. Rather, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled

into court there." *Burger King,* 85 L.Ed.2d at 542, *World-Wide Volkswagen,* 444 U.S. at 297.

The first tier of due process analysis necessarily requires that courts look to the particular facts of each case to decide whether the "purposeful availment" requirement has been met. *Kulko v. Superior Court,* 436 U.S. 84, 92 (1978). The minimum contacts test of personal jurisdiction cannot be performed by mechanical application, *Id.,* or by the application of "talismanic" formulas. *Burger King,* 85 L.Ed.2d at 549. Each case must be determined by careful scrutiny of its own particular facts. The Gordian knot of *in personam* jurisdiction may not be cut but must be carefully and constitutionally unravelled in each case.

As demonstrated below, analysis of the first tier of the due process inquiry should result in a finding that Dr. Connolly does not have sufficient minimum contacts with the State of Colorado on which to base the exercise of personal jurisdiction. Even if his reply to the hospital's inquiry regarding Dr. Burt establishes sufficient contacts with the State of Colorado, the second tier of due process inquiry should result in a finding that to exercise jurisdiction in this case would not comport with fair play and substantial justice.

II. DISCHARGE OF AN ADMITTED DUTY TO RESPOND TO AN UNSOLICITED INQUIRY INITIATED BY THE PLAINTIFF IN ANOTHER STATE CANNOT CONSTITUTE A CONSTITUTIONALLY COGNIZABLE CONTACT WITH THE FORUM.

A. The Essential Constitutional Ingredient of Purposeful Availment of The Benefits and Protections of the Laws of the Forum is Absent Here.

As Chairman of the Department of Orthopedic Surgery and Rehabilitation at the University of Nebraska Medical School, Dr. Connolly has the duty to respond candidly to requests for information on his former students coming from hospitals or other institutions wherever his students may be applying for medical staff positions. Connolly Affidavit, J.A. 34-36, ¶¶ 2 & 10-14; Wood Affidavit, J.A. 41, ¶ 24. Dr. Burt not only did not controvert the existence of this duty but affirmatively conceded its existence in his Reply Brief to the Tenth Circuit Court of Appeals. Reply Brief of Appellant at 5, *Burt v. Board of Regents*, 757 F.2d 242 (10th Cir. 1985).

Dr. Connolly's duty results not only from his official position at the University of Nebraska but also from the fact that he is a licensed member of the medical profession which must rely largely on peer review and evaluation to insure that only qualified individuals are permitted to practice. *See, e.g.*, C.R.S. § 12-43.5-101(2) (1985 repl. vol.) (statutorily imposing upon the medical profession the duty to insure high quality health care to the public at the lowest reasonable cost).

Dr. Connolly responded to the hospital inquiry in his official capacity at the University of Nebraska. *See* Connolly Affidavit, J.A. 35, ¶¶ 10 & 11; *see also* Complaint, J.A. 5, ¶ 11. The reply, sent in discharge of Dr. Connolly's duties was thus not gratuitously made. Nor did it involve any commercial transaction or payment, offer, or expectation of any fee or other benefit flowing to Dr. Connolly. Unlike the article written by petitioners in *Calder,* Dr. Connolly's letter had no commercial purpose, and no advantage was derived by Dr. Connolly other than the discharge of an official responsibility. Also unlike *Calder,* this case involves no activity directed at Colorado for the purpose of obtaining information on which the allegedly defamatory letter was based. The letter concerned only Dr. Burt's activities in Nebraska and was based on information, knowledge, and opinions held there.

Generally, to have "purposefully availed" oneself of the "privilege of conducting activities" within a state, one must invoke the benefits and protections of the state's laws. *Kulko,* 436 U.S. at 94; *Hanson v. Denkla,* 357 U.S. at 253. Further, the purposeful availment must be of a type that would justify bringing a non-resident before a foreign tribunal. *See Shaffer v. Heitner,* 433 U.S. 186, 216 (1977).

By making a single reply to an inquiry instigated by the action of Dr. Burt, Dr. Connolly cannot be said to invoke the benefits and protections of Colorado laws. *Id.* The letter written by Dr. Connolly and sent into Colorado creates only a "fortuitous" or "attenuated" contact for which Dr. Connolly should not be haled into the Colorado courts. *Burger King,* 85 L.Ed.2d at 542; *see International Shoe,* 326 U.S. at 317. The foreseeability of litigation in

the forum is substantially diminished where the defendant's contact with the forum state consists only of an isolated act. *Burger King,* 85 L.Ed.2d at 543 n.18; *see World-Wide Volkswagen,* 444 U.S. at 297.

This Court has previously considered a case involving nearly identical issues and substantially similar facts as presented by this case. In 1978, the Missouri Supreme Court decided the case of *State ex rel. Sperandio v. Clymer,* 568 S.W.2d. 936 (Mo. 1978) (*"Sperandio I"*), a suit for medical malpractice against two Missouri physicians and another physician, Dr. Pemberton, who resided in Salt Lake City, Utah. The Complaint alleged that the plaintiff had been injured as a result of improper procedures employed by the Missouri physicians in performing hip surgery on the plaintiff and alleged a civil conspiracy among the defendants to prevent the plaintiff from learning of the malpractice.

One of the Missouri defendants had corresponded by mail with Dr. Pemberton, an authority on the surgical procedure involved. The letter to Dr. Pemberton, which was unsolicited by him, informed him of the diagnosis of the plaintiff's condition and requested Dr. Pemberton's " 'opinion' as to 'what you would consider the most satisfactory treatment.' " *State ex rel. Sperandio v. Clymer,* 581 S.W.2d 377, 378 (Mo. 1979) (*"Sperandio II"*). X-ray pictures were enclosed with the request for Dr. Pemberton's consultation.

Dr. Pemberton responded to the Missouri physician confirming his diagnosis and suggesting procedures to be employed on the particular patient. Dr. Pemberton made marks on the X-rays to indicate surgical steps. The procedure he suggested was used on the patient and resulted in the injuries alleged.

Other than the letter sent to Missouri in response to the Missouri physician's solicitation, Dr. Pemberton had no contacts with the State of Missouri. He had received no fee for his consultation by mail, nor had any fee been offered or requested; his response by letter had been gratuitously made. No physician/patient relationship had been established between Dr. Pemberton and the plaintiff. Nevertheless, the Missouri Supreme Court found that Dr. Pemberton's gratuitous reply established sufficient minimum contacts with Missouri because "(1) Missouri has an interest in securing redress for its citizen . . . who was injured in Missouri; and (2) Dr. Pemberton's acts were performed *for the purpose of causing an effect in Missouri.*" *Sperandio I*, 568 S.W.2d at 936 (emphasis added); *see also Sperandio II*, 581 S.W.2d at 380.

Dr. Pemberton petitioned this Court for a writ of certiorari on the jurisdiction issue, and in a memorandum decision, this Court granted certiorari, vacated the judgment of the Missouri Supreme Court, and remanded the case for further consideration in light of *Kulko v. Superior Court*, 436 U.S. 84 (1978), which this Court had then recently decided. *Pemberton v. Sperandio*, 439 U.S. 812 (1978) (Mem.). On remand, the Missouri Supreme Court reversed its earlier decision. *Sperandio II*, 581 S.W.2d at 377.

In *Sperandio II*, the Missouri Supreme Court discussed the five considerations enunciated in *Kulko* which dictated against the exercise of personal jurisdiction in that case: (1) by agreeing to allow his children to live in California, Kulko could not be said to have purposefully availed himself of the benefits and protections of

California laws; (2) Kulko did not derive any direct financial benefit as a result of his children living in California; (3) no physical injury had resulted to persons or property within California;[2] (4) the claim did not arise from Kulko's commercial transactions, and thus no commercial benefits were sought; and (5) sending a child to California was not a commercial act and connotes no intent to obtain or expectancy of receiving any corresponding benefit that would make the exercise of personal jurisdiction in the forum state fair. *Sperandio II*, 581 S.W.2d at 381-82.

The Missouri Supreme Court found that "the legal similarities and the legal principles embodied [in *Kulko*] are sufficient for us to conclude that under the circumstances here, Dr. Pemberton is not subject to jurisdiction *in personam* in Missouri." *Id.*, 581 S.W.2d at 382. The letter requesting Dr. Pemberton's assistance was unsolicited by him; no commercial or financial benefit was received by Dr. Pemberton, nor was any requested or offered; no commercial transaction was involved; nothing indicated that Dr. Pemberton knew whether his technique was actually used as there was no further correspondence between Dr. Pemberton and the Missouri doctors. *Id.*, 583 S.W.2d at 382.

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2 In *Sperandio*, physical injury to the plaintiff had been alleged, but such injury was still insufficient to make the exercise of personal jurisdiction over Dr. Pemberton "reasonable." *Sperandio II*, 581 S.W.2d at 382 n.5 (applying Restatement (Second) of Conflict of Laws, § 37 (1971).). Here, there has been no physical injury to any person within Colorado. Dr. Burt alleges injury to his property interests (Amended Complaint at ¶¶ 4, 6, 7, and 8, J.A. 65-66), but he does not have sufficient property interest in his reputation to claim that any "property" has been physically injured. *See Paul v. Davis*, 424 U.S. 693, 712 (1976).

Strikingly similar circumstances are found in this case.[3] The letter inquiring of Dr. Burt was unsolicited by Dr. Connolly. Dr. Connolly neither expected nor received any fee for replying to the inquiry. No commercial transaction was involved, and thus no commercial benefits were sought. Finally, no physical injury has resulted to any person or property within Colorado. In short, Dr. Connolly's acts in responding to the inquiry about Dr. Burt connote no intent to obtain or expectancy of receiving any benefit within Colorado that would make the exercise of personal jurisdiction in the forum state fair.

As noted above, in determining whether a defendant has purposefully availed himself of conducting activities within a forum, the critical inquiry is not foreseeability of causing harm within the forum but foreseeability of being haled into court there. The nature and quality of defendant's activities within the forum state must be considered in determining whether as a matter of fact such foreseeability test has been met. *See, Burger King,* 85 L.Ed.2d at 542, 543, n.18; *World-Wide Volkswagen,* 444 U.S. at 297.

It may be appropriate for a Court to consider the instrumentality of the harm in the forum state. *World-Wide Volkswagen,* 444 U.S. at 318 (Blackmun, J. dissenting); *see also, Id.,* at 314 (Marshall, J. dissenting) (where

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[3] Despite the affidavit of Dr. Grant Steffen, J.A. 89, Dr. Connolly had no way of knowing whether a Colorado hospital would deny staff privileges to Dr. Burt based on Dr. Connolly's letter. More than three years had passed between Dr. Burt's completion of the residency program and the inquiry from Colorado, during which time Dr. Burt presumably could have established credentials which would mitigate against the effect of Dr. Connolly's letter.

injury is caused by a defective automobile, the utility of which derives from its mobility); *see also Calder*, 465 U.S. 783 (where a defamatory article is published in a newspaper with a circulation of 600,000 in the forum state). This case does not involve the type of instrumentality which would cause one to foresee being haled into a foreign court.

Here, Dr. Connolly merely replied to an inquiry which was, in effect, solicited by Dr. Burt. The letter of inquiry promised that Dr. Connolly's reply would be kept confidential, J.A. 36, and Dr. Connolly made his reply in the belief that it would be held in confidence. Connolly Affidavit, J.A. 35, ¶ 13.

Furthermore, the District Court found, as a matter of fact, that litigation in a foreign jurisdiction arising from Dr. Connolly's response to a request for a recommendation anywhere in the world his former student may be applying for a job was not reasonably foreseeable by him. J.A. 103-04. This finding is not clearly erroneous and should have been affirmed by the Court of Appeals. *Opinion below*, 757 F.2d at 247, J.A. 115-16 (Seth, J. dissenting); *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir. 1974); 2 J. Moore, *Moore's Federal Practice*, ¶ 4.41-1[3] at 4-473 (2d ed. 1985).

B. The Contact in Question Resulted Solely From The Unilateral Act of The Plaintiff in Choosing To Apply For Hospital Privileges in Colorado.

When Dr. Burt moved to Colorado and applied for staff privileges there, routine inquiry was made into his background. Inquiry letter, J.A. 36. As conceded by

Dr. Burt, Dr. Connolly was duty-bound to respond to the inquiry. In discharge of this duty, Dr. Connolly sent a letter, alleged to have caused injury to Dr. Burt in Colorado, to the hospital to which Dr. Burt was applying for privileges.

Dr. Connolly did not, however, "purposefully avail" himself of the privilege of conducting activities in Colorado because to conclude that he did necessarily presupposes that he was to "structure [his] primary conduct with some minimum assurance as to where that conduct will and will not render him liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Here, there was no choice of whether or not to send information into Colorado in response to the inquiry Dr. Connolly received. Dr. Connolly did not solicit the inquiry, nor did he seek out the Presbyterian Denver Hospital in order purposefully to undermine Dr. Burt's chances of obtaining staff privileges. *Compare Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1492, 79 L.Ed.2d 804 (1984) (finding personal jurisdiction where defendants actively sought out plaintiff and published a libelous article in the state where she resided).

Dr. Connolly has no control over where his ex-student may decide to locate and apply for hospital staff privileges. Dr. Connolly must respond to inquiries concerning Dr. Burt's residency in orthopedics anywhere in the world Dr. Burt may wish to establish a practice. Dr. Connolly was but a passive player in creating contacts with the forum state. It was the unilateral activity of Dr. Burt, not purposeful acts of Dr. Connolly, which created the only contact with Colorado. Dr. Burt's solicitation in Colorado of a letter of reference from Dr. Connolly in Nebraska necessarily drew the response from Dr. Con-

nolly to Colorado. *Opinion below*, 757 F.2d at 246, J.A. 113 (Seth, J. dissenting).

This Court has uniformly recognized the impropriety of exercising personal jurisdiction in forums chosen by the unilateral activity of someone other than the defendant.

In *World-Wide Volkswagen*, this Court held that due process forbids the exercise of personal jurisdiction over an automobile distributor and a dealer whose only contact with the forum state was a customer's decision to drive there, even though the defendants' product caused severe injuries to persons in the forum.

In *Kulko v. Superior Court*, personal jurisdiction in the California Courts could not be exercised over a divorced husband sued for child support payments whose only affiliation with the forum was created by his former spouse's decision to settle there, even though he had acquiesced in his children's decision to live in California which resulted in an "effect" being felt there.

In *Hanson v. Denkla*, personal jurisdiction could not be exercised over a trustee whose only connection with the forum state resulted from the settlor's decision to exercise her power of appointment there.

In *Rush v. Savchuck*, 444 U.S. 320 (1980), the defendant could not be sued in Minnesota just because he was insured by an insurance company that was amenable to suit there, even though Minnesota had an interest in obtaining redress for its resident.

In each of these cases, the fact that the defendants had "no opportunity to 'alleviate the risk of burdensome litigation' " in the forum state was the determinative factor in denying personal jurisdiction. *Burger King*, 85 L.Ed.2d at 542 n.17.

Similarly, in *Premier Corp. v. Newsom*, 620 F.2d 219 (10th Cir. 1980), the Tenth Circuit Court of Appeals upheld the trial court's ruling that defendants did not have sufficient minimum contacts with the State of Colorado to warrant the exercise of personal jurisdiction over them. The *Premier* defendants were physicians, both citizens of South Carolina, who had entered into a purchase and management contract in South Carolina with Premier Corporation whereby cattle bought by defendants were kept and maintained by plaintiffs in Colorado.

After noting that the defendants had never been in Colorado in connection with the transaction, the Court concluded that the fact that the defendants knew that their cattle were maintained in Colorado was not jurisdictionally significant, holding that plaintiff's unilateral activity pursuant to the contract did not give rise to sufficient minimum contacts. The court stated:

> To hold to the contrary would in the instant case mean that the defendants could be required to defend in any one of the fifty states where [plaintiff] chose to maintain the cattle. Such is not our idea of fair play.

Id. at 223. Indeed, in the present case, to find that jurisdiction was properly imposed upon Dr. Connolly would mean that he could be required to defend in any one of the fifty states where one of his ex-students decides to go and ask that a recommendation be sent.

Other courts have also refused to exercise *in personam* jurisdiction in cases when the defendant's connection with the forum is the result of another party's actions. In *Ballard v. Fred E. Rawlins, M.D., Inc.*, 101 Ill.

App. 3d 601, 428 N.E.2d 532 (1981), the Appellate Court of Illinois refused to exercise *in personam* jurisdiction over a Missouri physician who treated patients that resided in Illinois where the treatment provided was always given in Missouri. In *Wright v. Yackley*, 429 F.2d 2897 (9th Cir. 1972), the Ninth Circuit refused to exercise *in personam* jurisdiction over a South Dakota physician who mailed a prescription to his former patient who had moved to Idaho. In *Associated Inns & Rest. Co. v. Development Associates*, 516 F.Supp. 1023 (D.Colo. 1981), the Federal District Court in Colorado refused to exercise *in personam* jurisdiction over a party to hotel management contracts whose only contacts with Colorado resulted from the plaintiff's decision to relocate there, creating the necessity of holding certain business meetings in Colorado between the parties.

Also, courts are disinclined to find personal jurisdiction when an alleged defamatory statement was solicited by the plaintiff or a third party and was not gratuitously initiated by the defendant. *McBreen v. Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976) (a single telephone call initiated by a reporter to defendant attorney was not, in the ordinary course of his affairs, deliberately placed into the stream of commerce and, otherwise, his contacts with the forum state were insufficient to justify exercise of *in personam* jurisdiction by the District Court); *Findlay v. Dethuit*, 86 A.D. 2d 789, 446 N.Y.S.2d 951 (1982) (defendant, a citizen of France, who made a response to a single overseas phone communication from a New York appraisal association was not found to have engaged in the transaction of business within the forum state or to have committed a tortious act within the state.)

As in the foregoing cases, Dr. Connolly is not in a position to alleviate the risk of out-of-state litigation by severing connections with those jurisdictions. Dr. Connolly cannot refrain from establishing the *de minimus* contact with a foreign jurisdiction that has been established in this case, in order to control the risk of out-of-state litigation, without refusing to reply to requests for references from his students. To allow contacts with the forum that have been created as a result of the unilateral activity of Dr. Burt to result in the exercise of personal jurisdiction over Dr. Connolly in this case would be tantamount to appointing each of Dr. Connolly's students as his "agent for service of process" wherever they may decide to travel. *See World-Wide Volkswagen*, 444 U.S. at 296.

III. CONTRARY TO THE TENTH CIRCUIT'S IMPLICIT HOLDING, MERE EFFECT IN THE FORUM IS NOT IPSO FACTO SUFFICIENT TO IMPOSE PERSONAL JURISDICTION.

Mere effect in the forum has never been held to be sufficient, in and of itself, to allow for imposition of personal jurisdiction consistent with the Fourteenth Amendment. *Calder* did not so hold.

In imposing jurisdiction over the reporter and editor in *Calder*, this Court approved of the "effects" test used by the California Court of Appeal, *Calder*, 79 L.Ed.2d at 810 n.6, but in doing so, did not dispense with the *International Shoe* due process analysis expressly incorporated into Restatement (Second) of Conflict of Laws, § 37, the genesis of the "effects" test. That section provides:

> § 37. Causing Effects in State by Act Done Elsewhere.
>
> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects *unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.*

Restatement (Second) of Conflict of Laws § 37 (1971) (emphasis added). The italicized portion of the foregoing test incorporates both tiers of *International Shoe's* minimum contacts analysis.

The California "effects" test derived from the Restatement and approved by this Court in *Calder* thus expressly recognizes that mere effect in the forum will not, alone, support jurisdiction. California has so held: "[t]he mere causing of an 'effect' in California . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be 'unreasonable.'" *Sibley v. Superior Court*, 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322, 325, *cert. denied*, 429 U.S. 826 (1976). *Sibley* held that jurisdiction could not constitutionally be imposed upon a non-resident guarantor of a loan, despite the fact that the effects of failure to perform occurred in the State of California. *Sibley* noted that the non-resident did not purposely avail himself of the privilege of conducting activities in California, would not have derived any economic benefit from his conduct, and although he may reasonably have foreseen that breach of his agreement would have an effect in California, the fact that he did not assume any obligation which he might have sought to enforce in Cali-

fornia against the plaintiff made imposition of jurisdiction unreasonable under the circumstances.

This Court has also previously recognized the due process limitation contained in § 37 of the Restatement. *See, Kulko v. Superior Court,* 436 U.S. 84, 96 (1978) (" . . . the Restatement recognizes that there might be circumstances that would render 'unreasonable' the assertion of jurisdiction over the nonresident defendant.").

The State of Colorado also recognizes that the mere occurrence of an "effect" within its boundaries does not automatically support imposition of jurisdiction. *See, e.g., Fleet Leasing, Inc. v. District Court,* 649 P.2d 1074 (Colo. 1982) (even though tortious conduct initiated in another jurisdiction may cause injury in Colorado and thus bring the defendant within the letter of the long-arm statute, determination must still be made as to whether exercise of *in personam* jurisdiction in the particular case comports with due process of law); *Granite States Volkswagen, Inc. v. District Court,* 177 Colo. 42, 492 P.2d 624 (1972) (jurisdiction refused, prescient of *World-Wide Volkswagen); C.F.H. Enterprises, Inc. v. Heatcool,* 538 F.Supp. 774 (D. Colo. 1982) (mere sending of a report into Colorado allegedly relied upon by plaintiff not a sufficient affiliating circumstance); *Associated Inns & Rest. Co. v. Development Associates,* 516 F.Supp. 1023 (D. Colo. 1981) (mere effect in forum insufficient if defendant did not purposely avail himself of the privilege of conducting activity within the state).

The Tenth Circuit Court of Appeals misread *Calder* by concluding that its "repeated emphasis . . . on the intentional nature of defendants' conduct and its calculated injurious effect in the forum state," *Opinion below,* 757

F.2d at 245, J.A. 110, somehow dictated the result that when an intentional tort is alleged, jurisdictional prerequisites will necessarily be satisfied.

The Tenth Circuit ignored the fact that *Calder*, in adopting the California "effects" test, also necessarily adopted the "unless" exception to it.

Further, the majority below ignored or overlooked the fact that this Court's opinion in *Calder* found that exercise of jurisdiction over the non-residents there was not unreasonable in light of other facts, not the least of which is the fact that the publication for which they wrote had its largest circulation in the forum state. *Calder*, 79 L.Ed. 2d at 812. Numerous other factual dissimilarities between *Calder* and the present case render jurisdiction reasonable in the former. The alleged defamation in *Calder* arrived in California through the instrumentality of a nationally published commercial weekly newspaper, was unsolicited by the plaintiffs, denied by the plaintiffs, drawn from plaintiffs' activities in the forum state, and, produced, in part, from various telephone calls and visits to that state in creaitng the story.

As correctly observed by Judge Seth in his dissenting opinion, 757 F.2d at 245, J.A. 112, *Calder* should be read as adopting the "effects" test "in the context of the minimum contacts doctrine," requiring constitutional analysis of both phases of the *International Shoe* standard. The majority opinion ignored the fact that the inquiry in question was "a required answer . . ., not unsolicited or gratuitously made, [and] . . . initiated by plaintiff." *Opinion below*, 757 F.2d at 246, J.A. 113 (Seth, J., dissenting).

In concluding that its result was dictated by *Calder*, the majority's opinion below ignored *Calder's* reliance on multiple connections between the forum state and the defendants and ignored glaring factual dissimilarities between the two situations.

In summary, *Calder* did not carve out a constitutional black hole in the Fourteenth Amendment by holding that the intentional transmission of an allegedly defamatory message to a foreign state will, alone, allow for constitutional imposition of jurisdiction.[4] To the contrary, under facts far distant from those here presented, *Calder* appropriately applied the "effects" test through recognition of various factors which rendered exercise of jurisdiction over the reporter and editor of the *National Enquirer* constitutionally fair and reasonable under the circumstances presented.

IV. EVEN IF ISSUANCE OF THE LETTER COULD BE SAID TO CONSTITUTE A CONSTITUTIONALLY SUFFICIENT MINIMUM CONTACT, THE FORUM'S PARAMOUNT INTEREST IN MAINTAINING THE QUALITY OF HEALTH CARE WEIGHS AGAINST FINDING COLORADO A FAIR FORUM.

The Tenth Circuit Court of Appeals majority opinion, after concluding that petitioner's letter had an "effect" in Colorado, went no further and failed to address the second tier of inquiry mandated by *International Shoe:* i.e. given

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[4] In addition, the Tenth Circuit failed to appreciate that since Dr. Connolly had a duty to respond to the Colorado inquiry, such response, although perhaps "intentional" in a factual or metaphysical sense, was not in a jurisdictional sense: Dr. Connolly had no choice but to reply.

a constitutionally sufficient contact, does imposition of jurisdiction under the circumstances comport with traditional notions of fair play and substantial justice?

Even if Dr. Connolly's letter is held to constitute a sufficient minimum contact, the circumstances of this case dictate the conclusion that imposition of jurisdiction here would be unreasonable and unfair for the reasons discussed below.

Citing *Keeton*, the majority opinion concluded that "Colorado has a significant interest in the present case." *Opinion below*, 757 F.2d at 244, J.A. 109. A forum's interest in adjudicating a particular dispute only comes into play, however, in the second tier of the due process analysis as part of the balancing test for determination if exercise of personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 85 L.Ed.2d at 543. Here, the Tenth Circuit allowed the tail to wag the dog by finding that an interest of the forum could substitute for a minimum contact. Such has never been the law of this Court. Indeed, a state's interest in providing redress for alleged wrongs committed within its boundaries exists in every case. If that interest, alone, can satsfy the due process requirements of the Fourteenth Amendment, then the second tier of *International Shoe* becomes mere window dressing.

Keeton simply has no bearing upon the present matter. The essential question in *Keeton* was whether the lack of contracts between the plaintiff and the forum could prevent the forum state from exercising jurisdiction. After noting that jurisdiction had previously been upheld in cases in which there were no contacts between the plaintiff and the forum, this Court properly focused on the " 're-

lationship among the defendant, the forum, and the litigation.' " *Keeton,* 79 L.Ed.2d at 798 (emphasis added), quoting *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977). The result in *Keeton* derived from the regular, systematic, and continuous activity of the defendant in the forum state through extensive circulation of a national commercial publication.

Keeton is thus an example of a case involving "general" jurisdiction based upon continuous and systematic activities of the defendant and represents no departure from or extension of prior cases, such as *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Reliance by the Court of Appeals upon *Keeton* was, therefore, misplaced.

In addition, the Tenth Circuit refused to consider the important countervailing interest of the State of Colorado in the quality of medical care available there through unfettered exchange of information regarding health care professionals.

Quite simply, Dr. Burt's completion of a residency program in orthopedic surgery does not, in and of itself, attest to his competency to practice in that specialty. If such were the case, then the Presbyterian Denver Hospital merely needed to have confirmed the bare fact of Dr. Burt's completion of the residency and not to have inquired further concerning "his medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc." Inquiry letter, J.A. 36.

Acquisition of a certificate of residency does not attest to the quality of the graduate's skills beyond acknowledgment that his or her performance must not have been

so poor as to cause dismissal from the residency program. Similar to any certification of graduation, it does not distinguish from those who performed superbly in the program from those whose performances were below average or marginal. In short, the certificate cannot present a complete picture of respondent's experience, qualifications, and competence without further comment and opinion from his instructors, supervisors, and fellow professionals.

The medical profession is self-disciplined to a very substantial degree and charged with a public trust to engage in peer review of its members and to regulate, at least in a mimimal fashion, the expertise of its members.

The medical profession and hospitals are highly regulated by the State of Colorado through various statutory schemes. *See, e.g.*, Colorado Medical Practice Act, C.R.S. §§ 12-36-101, *et seq.* (1985 repl. vol.) and C.R.S. §§ 25-3-110, *et seq.* (1982 repl. vol. & Cum. Supp. 1985).

Even more to the point, the Colorado General Assembly has deemed it the *duty* of the health care profession to discipline and control the practice of health care in Colorado. C.R.S. § 12-43.5-101 (1985 repl. vol.), the legislative declaration to the Colorado peer review statute, provides:

> (1) It is the policy of this state to encourage discipline and control of the practice of health care rendered by physicians by committees made up of physicians licensed to practice in this state. It is the duty of such committees to openly, honestly, and objectively study and review the conduct of practice by members of the profession, including the quality of service and, when appropriate, the length of hospital confinement.
>
> (2) It is the duty of the health care profession to do all things necessary to provide the public with services of proper quality at the lowest reasonable cost.

> To this end, review committees and members thereof should be granted certain immunities relating to their actions within the scope of the official conduct of their responsibilities and should additionally review, discipline, and educate the profession by free, open, and unfettered exercise of professional judgment.

This statute has been liberally construed by the Colorado Supreme Court on more than one occasion. *Posey v. District Court,* 196 Colo. 396, 586 P.2d 36 (1978), interpreting it, held that records of hospital disciplinary actions were immune from discovery under the statutory scheme in a malpractice case brought by a plaintiff against a physician and the hospital at which surgery was performed contending, among other things, that the hospital had negligently retained the defendant physician on its staff. Refusing to be bound by the literal language of the peer review statute (which would not have prevented the discovery sought), the Court construed it to preclude discovery of peer review materials in "any civil action," recognizing that it was "apparent that such [peer review] investigations will be merely perfunctory if the wide-open inquiry envisioned by the statutory scheme is made the subject of discovery." *Id.* at 38. This case recognized the public benefit of "'[c]onstructive professional criticism'" and held that the legislative declaration, quoted above, "clearly expresses the legislature's desire that hospital review committees be allowed to act unfettered by fear of subsequent liability." *Id.*

Colorado's interest in the quality of medical care received a second shot in the arm from the Colorado Supreme Court in *Franco v. District Court,* 641 P.2d 922 (Colo. 1982). In this case, the Court held that the peer review

statute immunized from discovery hospital peer review documents even in a tort case claiming wrongful suspension of hospital privileges brought by the physician under investigation. With the sole exception of a judicial review proceeding provided for in the statute, the Colorado Supreme Court held that hospital peer review records were immune from discovery in any civil action, recognizing that:

> . . . members of the medical profession cannot be expected to initiate or willingly participate in a peer review investigation if their testimony and reports may be subjected to discovery in subsequent civil litigation involving issues far beyond a meaningful judicial review of the committee's action.

Id. at 929. Moreover, the court observed that:

> . . . The statutory peer review process, in our opinion, represents a legislative choice of medical staff candor at the expense of pretrial discovery in any lawsuit not involving a judicial review of the committee's recommendations and resulting disciplinary action by the hospital's governing board.

Id. at 929. The Court characterized the legislature's choice of absolute immunity from discovery as an attempt "to avoid any chilling effect on the review committee's statutory duty 'to openly, honestly and objectively study and review the conduct of practice by members of the profession.' " *Id.* at 930; *see also, Beth Israel Hosp. v. District Court,* 683 P.2d 343 (Colo. 1984).

Thus, the Colorado peer review statute and decisions from the highest court of this state interpreting it demonstrate beyond dispute that Colorado has not only a significant interest in the quality of health care in this state but a substantial one expressed through promulgation of a

comprehensive legislative scheme to encourage candid observations concerning the competence of physicians unfettered by fear of subsequent liability in a case such as this.

The Tenth Circuit majority opinion completely ignored this interest of the forum which, in the circumstances presented (involving a physician's statement of opinion as to the qualifications of another physician), dramatically outweighs Colorado's interest in providing redress for an alleged libelous statement in the context of a reference request concerning a physician seeking hospital privileges in Colorado. *See Cook v. G. D. Searle & Co., Inc.*, 475 F.Supp. 1166, 1169 (S.D. Ia. 1979) (concluding in a medical malpractice case against non-resident physicians that the forum's "natural interest in the protection of its citizens [was] countered by an interest in their access to medical services wherever needed.").

Indeed, this case presents a situation which may be said to be the other side of the constitutional coin presented in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). One of the prime reasons justifying exercise of jurisdiction in *McGee* was the fact that California had passed a special statute governing disputes between insureds and insurance companies. This legislative expression of state interest was of pivotal importance in imposing jurisdiction in that case. *Id.* at 223-24.

In the present matter, we have exactly the opposite situation: the existence of a state statute which demonstrates a significant state interest is *not* imposing jurisdiction. Colorado has legislatively and judicially expressed an undeniable state interest in encouraging exchange of

information concerning members of the medical profession and has done so to the detriment of some traditional tort remedies.

In this case, therefore, Colorado's state interest in regulating members of the health care profession within its boundaries is a countervailing state interest which substantially outweighs the interest of Colorado in providing tort redress to a physician applicant for hospital privileges against an ex-teacher and fellow physician expressing his opinions as to the professional competence of the former.

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CONCLUSION

For the reasons above discussed, petitioner submits that imposition of jurisdiction upon him under the particular circumstances presented would violate his liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

The only contact that this controversy has with the State of Colorado arose from respondent's unilateral decision to move there and apply for hospital privileges, triggering an unsolicited inquiry to the petitioner from Colorado to which petitioner had a duty to respond. Dr. Connolly's response by private letter was made in the context of a promise of confidentiality. Dr. Connolly simply did not avail himself of the right to conduct any activity in a way that would justify bringing him before a tribunal within the State of Colorado and had no reasonable anticipation of being haled there into a Colorado court merely by expressing his opinion as to the professional qualifi-

cations of a former student. The absence of a constitutionally cognizable contact between petitioner and the Colorado forum precludes exercise of jurisdiction against him there.

Moreover, even if a cognizable affiliation is present, it is both unreasonable and unfair to impose jurisdiction over the petitioner under the circumstances presented because of the particular nature of this controversy and Colorado's public interest in the free exchange of opinions concerning health practitioners in this state.

WHEREFORE, petitioner respectfully requests this Honorable Court to enter its order reversing the Tenth Circuit Court of Appeals opinion in this case and to remand this matter to the District Court with directions to dismiss this case with prejudice and for such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted,

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